Article

1. Introduction

One of the principal motivations of international criminal justice institutions is to provide victims with a sense that justice has been done. Many believe that the best way to accomplish this is to put on trial those individuals accused of committing international crimes. One barrier to providing victims with justice through trials has been the general unwillingness of international and internationalised criminal courts and tribunals to try individuals in their absence. However, sentiment is growing in favour of holding trials regardless of whether the accused is present. This is evidenced by the decision to permit trials *in absentia* at the Special Tribunal for Lebanon and the addition of Rules 134 *bis*, 134 *ter* and 134 *quater* to the International Criminal Court's Rules of Procedure and Evidence, all of which allow some portion of the trial to take place in the absence of the accused. This change in approach to trials *in absentia* raises a novel question for international criminal law: do trials conducted in the absence of the accused still provide the victims of atrocity crimes with the sense that justice has been done?

This article will examine whether international criminal trials can adequately fulfil the interests of the victims without the full participation of the accused. First, it will discuss what justice for the victims of atrocity crimes means in the context of an international criminal trial. It does this by identifying the three outcomes most commentators believe provide the victims with a sense that justice has been done. Next, it will define the accused's right to be present at trial and discuss what the right is meant to protect. The article will then individually examine those three outcomes and determine whether they can be accomplished in the accused's absence. The article concludes that trials conducted without the accused being present do not meet all of

the needs of victims and therefore those needs should not act as justification to limit the accused's right to be present.

2. Justice for the Victims of Atrocity Crimes

Delivering justice to the victims of atrocity crimes has been described as the most important function performed by international and internationalised criminal courts and tribunals and is a defining purpose of the International Criminal Court.[1] A victim, as defined by the International Criminal Court, is a person that fits each of the following four criteria: 1) they are a natural or legal person; 2) who has suffered harm; 3) caused by the commission of a crime falling within the jurisdiction of the International Criminal Court; and 4) a causal nexus exists between the harm suffered and the crime.[2] Numerous different actors within international human rights and international criminal justice institutions have confirmed that victims are increasingly a focal point of international criminal law.[3] The International Criminal Court was designed from its inception to ensure that the interests of the victims played a prominent role. At the opening of the Rome Conference, then United Nations Secretary-General Kofi Annan urged the delegates to develop a Statute in which 'the overriding interest must be that of the victims, and of the international community as a whole.'[4] Luis Moreno-Ocampo, the first prosecutor at the International Criminal

[1] L. E. Fletcher, 'Refracted Justice: The Imagined Victim and the International Criminal Court', in C. de Vos, S. Kendall and C. Stahn (eds.), *Contested Justice: The Politics and Practice of International Criminal Court Interventions*, (Cambridge: Cambridge University Press, 2015), at 302.
[2] Order for Reparations Pursuant to Article 75 of the Statute, *Katanga* (ICC-01/04-01/07) Trial Chamber II, 24 March 2017, at § 36; *citing* Judgment on the Appeals of the Prosecutor and the Defence Against Trial Chamber I's Decision on Victim Participation of 18 January 2008*, Lubanga* (ICC-01/04-01/06) Appeals Chamber, 11 July 2008, at §§ 61-65.
[3] Fletcher, *supra* note 1, at 307.
[4] *UN Secretary-General Declares Overriding Interest of International Criminal Court Conference Must be that of Victims and World Community as a Whole*, UN Doc. SG/SM/6597 L/2871, 15 June 1998.

Court, described his mandate as delivering 'justice for the victims.'[5] That position was reiterated by his successor, Fatou Bensouda, who feels that the prosecutor's responsibility is to investigate and try alleged perpetrators of atrocity crimes, 'where no-one else is doing justice for the victims.'[6] The importance of vindicating the interests of the victims was also confirmed by former International Criminal Court president, Judge Sang-Hyun Song, when he stated of the Court, we 'must not let down the countless victims around the world that place their hope in this institution.'[7]

The International Criminal Court's focus on the interests of the victims is not unique. Other international and internationalised criminal courts and tribunals have also demonstrated the importance of helping the victims of atrocity crimes. Antonio Cassese, in his capacity as the President of the International Criminal Tribunal for the former Yugoslavia, described protecting victims as 'the raison d'être' of the Tribunal.[8] In 2011, the president of the International Criminal Tribunal for Rwanda, Khalida Rachid Khan referred to 'seeking justice for the victims' as the driving force behind the Tribunal's goal of ensuring the non-reoccurrence of similar atrocities.[9] At the opening of the eighth plenary meeting of the Extraordinary Chambers in the Courts of Cambodia, President Judge Kong Srim observed that it was important to

---

[5] *ICC Prosecutor visits Egypt and Saudi Arabia*, ICC Doc. ICC-CPI-20080509-MA13, 9 May 2008.
[6] *Statement by the Prosecutor of the International Criminal Court Mrs Fatou Bensouda*, 22 October 2012, available online at https://www.icc-cpi.int/Pages/item.aspx?name=otpstatement221012, last visited on 14 August 2018.
[7] *ICC launches commemorations for 17 July – International Criminal Justice Day*, ICC Doc. ICC-CPI-20120706-PR822, 6 July 2012.
[8] A. Cassese, 'The International Criminal Tribunal for the Former Yugoslavia and Human Rights', 1997(4) *European Human Rights Law Review* (1997) 329-52, at 331
[9] *Sixteenth annual report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994*, UN Doc. S/2011/472, 29 July 2011, at § 89.

reconfirm their commitment to the Extraordinary Chambers' mission, 'in order to expeditiously and effectively deliver justice to all victims' in Cambodia.' [10] Emmanuel Ayoola, former President of the Special Court for Sierra Leone, described the Special Court's mission as 'to bring justice to the victims of the war in Sierra Leone.'[11] The Office of the Prosecutor at the Special Tribunal for Lebanon identifies 'bringing justice to victims' as one of the three parts of its mandate, and the President of the Tribunal asserted that all of the organs of the Tribunal are working towards 'vindicat[ing]…the rights of the victims and the punishment of the authors of very serious misdeeds'. [12] Further, in 2011, the prosecutors of all of the existing international criminal courts and tribunals released a joint statement underlining the importance of effectively and expeditiously completing their missions 'on behalf of the victims in the affected communities'.[13] Clearly, numerous different organs of the international and internationalised criminal courts and tribunals prioritize delivering justice to the victims of atrocity crimes even in the absence of an explicit statutory requirement to do so.

Despite the fact that many international criminal law institutions identify providing justice to the victims of atrocity crimes as their most important function,

---

[10] *Opening Speech by the Plenary's President Judge Kong Srim, During the 8th Plenary of the Extraordinary Chambers of the Courts of Cambodia (ECCC) on 13th September 2010*, 13 September 2010, available online at www.eccc.gov.kh/en/documents/public-affair/opening-speech-plenary39s-president-judge-kong-srim-during-8th-plenary-extra, last visited on 14 August 2018, at 3.
[11] *Second Annual Report of the President of the Special Court for Sierra Leone*, 2005, available online at www.rscsl.org/Documents/AnRpt2.pdf, last visited on 14 August 2018, at 3.
[12] *First Annual Report of the Special Tribunal for Lebanon*, 2010, available online at https://www.stl-tsl.org/en/documents/president-s-reports-and-memoranda/226-Annual-Report-2009-2010, last visited on 14 August 2018, at §§ 166, 246.
[13] *Joint Statement, Sixth Colloquium of International Prosecutors*, 15 May 2011, available online at www.rscsl.org/Documents/Press/OTP/Colloquium_Joint_Statement.pdf, last visited on 14 August 2018.

none of them substantively address what justice for the victims means in this context. Commentators have attempted to fill this gap by suggesting that the right to an effective remedy designed to eliminate the effect of the harm caused by the commission of the crime constitutes justice for the victims.[14] Realistically, it is probably impossible to fashion any true remedy for victims. The scope of the crimes committed against them and their suffering as a result of those crimes is simply too great. Regardless, attempts should still be made to acknowledge their victimhood and provide them with some form of redress.[15] While many different things might contribute to forming an adequate remedy, there are three primary components that must almost always be present. They are: developing a truthful record of events; establishing accountability for the crimes committed; and providing the victims with reparations.[16]

3. The Accused's Right to be Present at Trial

Providing victims with truth, accountability and reparations is made much easier when the accused is present during his or her trial. At one time this was a non-issue in international criminal law, as it was thought that the accused's right to be present at trial meant that international criminal trials could only take place in the presence of the accused. The presence of the accused at trial is considered 'an essential element of procedural equality' that gives meaning to the principle that 'criminal defendants are legally entitled to be personally present at their own trials.'[17]

---

[14] L. Moffett, *Justice for Victims Before the International Criminal Court*, (Abingdon (UK): Routledge 2014), at 30-1; *citing* D. Shelton, *Remedies in International Human Rights Law* (2nd edn., Oxford: Oxford University Press, 2005), at 7, 35-6.
[15] M. C. Bassiouni, 'Assessing Conflict Outcomes: Accountability and Impunity', in M. C. Bassiouni (ed), *The Pursuit of International Criminal Justice: A World Study on Conflicts, Victimization, and Post-Conflict Justice*, vol 1 (Antwerp: Intersentia, 2010), at 20.
[16] *Ibid* at 33-4.
[17] R. May and M. Wierda, *International Criminal Evidence* (Ardsley, NY (USA):

One reason it is important for the accused to be present during trial is to give him or her the opportunity to participate in, and understand, the proceedings against them, particularly during the presentation and examination of the evidence.[18] Generally, the accused should be present throughout the entirety of the proceedings so that he or she can exercise other fair trial rights, including: assisting in his or her own defence; consulting, and in some cases selecting, his or her own counsel; confronting the witnesses or the evidence presented against him or her; and testifying on his or her own behalf at trial.[19]

The accused's right to be present at trial is a qualified right. It allows the accused to choose whether he or she would like to attend trial, and carries with it an attendant duty imposed on international and internationalised criminal courts and tribunals preventing them from excluding the accused without his or her consent.[20] The right to be present can be waived voluntarily so long as the accused has sufficient notice of the proceedings that will permit him or her to make an informed decision not to appear.[21] The physical presence of the accused is not sufficient to comply with the right to be present, he or she must also have the ability to understand and participate in the proceedings.[22] As a result, a violation of the right to be present occurs when the trial is conducted in such a way as to limit the accused's ability to participate in

---

Transnational Publishers, Inc., 2002) 280; N. Cohen, 'Trial in Absentia Re-Examined', 40(2) *Tennessee Law Review* (1973) 155-194, at 156.

[18] S. J. Summers, *Fair Trials: The European Criminal Procedure Tradition and the European Court of Human Rights* (Oxford: Hart Publishing, 2007), at 117; F. Cassim, 'The Accused's Right to be Present: A Key to Meaningful Participation in the Criminal Process' (2005) 38 *Comparative & International Law Journal of Southern Africa* 285-303, at 285-6.

[19] D. A. Mundis, 'Current Developments: Improving the Operation and Functioning of the International Criminal Tribunals', 94 *American Journal of International Law* (2000) 759-773, at 761.

[20] C. H. Wheeler, *The Right To Be Present At Trial In International Criminal Law* (Leiden: Brill 2018), at 7.

[21] *Ibid*.

[22] Summers, *supra* note 18, at 113.

proceedings 'and he or she has not affirmatively authorized that limitation.'[23]

The term trial *in absentia* has no set meaning in international criminal law, and is often used to describe many different factual scenarios involving an accused's absence from trial.[24] There are four different types of absences from trial: 1) trial *in absentia*; 2) trial by default; 3) absence occurring after trial has commenced; and 4) absence resulting from an inability to understand or participate in trial.[25] There can be some overlap between these categories, and room exists within the categories themselves for further specificity. The first two types of absences, trial *in absentia* and trial by default, involve the entire trial being held in the absence of the accused. The latter two types of absences, those occurring after trial has begun and those resulting from an inability to understand or participate in proceedings, generally involve a defendant that is physically present in the courtroom for at least some part of the proceedings. Many international and internationalised courts and tribunals do not allow trials *in absentia* or trials by default, although all international and internationalised criminal courts and tribunals permit parts of the trial to occur outside of the accused's presence.

The Statutes of the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone all largely copied Article 14 of the International Covenant on Civil and Political Rights by describing the presence of the accused during trial as being one of

---

[23] Wheeler, *supra* note 20, at 7.
[24] S. Starygin and J. Selth, 'Cambodia and the Right to be Present: Trials *In Absentia* in the *Draft Criminal Procedure Code*' *Singapore Journal of Legal Studies* [2005] 170-188, at 185; C. Jenks, 'Notice Otherwise Given: Will In Absentia Trials at the Special Tribunal for Lebanon Violate Human Rights?', 33 *Fordham International Law Journal (Fordham ILJ)* (2009) 57-100, at 68; N. Pons, 'Some Remarks on in Absentia Proceedings before the Special Tribunal for Lebanon in Case of a State's Failure or Refusal to Hand over the Accused', 8(5) *Journal of International Criminal Justice (JICJ)* (2010) 1307-1321, at 1309.
[25] Wheeler, *supra* note 20, at 104.

the minimum guarantees of a fair trial.[26] Additionally, the requirement found in Article 63(1) of the International Criminal Court's Statute that '[t]he accused shall be present for trial' was interpreted as an indication that the international legal community had rejected trials *in absentia*.[27] However, the introduction of the Special Tribunal for Lebanon's Statute in 2007, which explicitly allows the accused to be tried *in absentia*, heralded a radical change in thinking about the role of trials *in absentia* in international criminal law.[28] This was followed in 2013 by the International Criminal Court's enactment of Rules 134 *bis*, 134 *ter* and 134 *quater*, all of which allow trial to continue outside of the physical presence of the accused.[29] These changes have made it increasingly clear that international criminal law does permit at least some form of *in absentia* proceedings. What remains unclear is whether the three elements that constitute a remedy for the victims of atrocity crimes can be fulfilled without the direct participation of the accused.

4. Can Justice be Achieved in the Absence of the Accused?

For *in absentia* trials to have any real purpose in the context of international criminal law they must produce some benefit, and preferably one that outweighs the diminution of the accused's fair trial rights that necessarily accompanies a trial *in absentia*. The victims of the alleged crimes for which the absent accused is being prosecuted are the ideal beneficiaries of that prospective benefit. The value of that benefit may in part depend on the extent of the accused's absence from their trial. An accused that is absent from the entirety of the trial is unable to contribute to restoring the victims' sense of justice. In contrast, an accused that is only absent for part of the

[26] Art. 14 ICCPR; Art. 21(d)(4) ICTYSt.; Art. 20(d)(4) ICTRSt.; Art. 17(4)(d) SCSLSt.
[27] Starygin and Selth, *supra* note 24, at 185.
[28] Art 22 STLSt.
[29] Rules 134 *bis*, 134 *ter* and 134 *quater* ICC RPE.

trial may still help enable the realization of this goal. The International Criminal Court recognized this in *Prosecutor v Ruto et al*. Trial Chamber V(A) authorised William Ruto's limited absence from trial so that he could attend to some of his official duties as Deputy President of Kenya but also mandated that Ruto be present whenever the victims presented their views and concerns in person so as to force him to confront the very human face of his actions. [30] This process of permitting the victims to directly confront the people allegedly responsible for their injuries is seen by some as having a positive therapeutic effect that can help the victims recover from the mental trauma of the crimes committed against them.[31]

The desire to provide the victims with a benefit must always be balanced against the need to provide the accused with a fair trial. It is generally agreed that the accused should only be convicted if his or her trial meets certain basic fair trial standards and a conviction obtained without meeting those standards of fair trial constitutes an injustice.[32] Article 64(2) of the International Criminal Court's Statute mandates that the Trial Chamber in a particular case shall ensure that 'a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.'[33] This instruction has been interpreted to mean that the interests of the accused must take precedence over those

[30] Reasons for the Decision on Excusal from Presence at Trial under Rule 134*quater*, *Ruto et al.* (ICC-01/09-01/11) Trial Chamber V(A), 18 February 2014, at § 79.
[31] E. Stover, 'Witnesses and the Promise of Justice in the Hague', in E. Stover and H. M. Weinstein (eds.), *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (Cambridge: Cambridge University Press, 2004), at 118; F.-X. Nsanzuwera, 'The ICTR Contribution to National Reconciliation', 3(4) *JICJ* (2005) 944-949, at 947.
[32] L. Douglas, 'Truth and Justice in Atrocity Trials', in W. A. Schabas (ed.), *The Cambridge Companion to International Criminal Law* (Cambridge: CUP, 2016), at 35.
[33] Art 64(2) ICCSt.

of the victims when the two conflict.[34] Prioritising the fair trial rights of the accused also underpins the declaration in Article 68(3) that victim participation must not be 'prejudicial to or inconsistent with' the rights of the accused.[35] However, others have reinforced the significance of the rights of the victims and the important role that being heard plays in their psychological healing process.[36] Perhaps the best way forward is to prioritize establishing the truth about an incident subject to the proviso that all decisions should be guided by what in practice will produce the most fair and impartial trial possible.[37]

A. Establishing the Truth

Establishing the truth has been identified as 'the cornerstone of the rule of law' and different international and internationalised criminal courts and tribunals have consistently identified the important role truth-finding plays in their missions.[38] The United Nations High Commissioner for Human Rights indicated in 2006 that victims have a 'right to truth', entitling them to learn: 'the full and complete truth' about relevant events and the circumstances in which they occurred; the identities of

---

[34] J. Williams, 'Slobodan Milosevic and the Guarantee of Self-Representation', 32(2) *Brooklyn Journal of International Law* (2007) 553-602, at 574; *citing* J. L. Falvey Jr, 'United Nations Justice or Military Justice: Which is the Oxymoron? An Analysis of the Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia', 19 *Fordham ILJ* (1995) 475-528, at 487.

[35] A. Pues, 'A Victim's Right to a Fair Trial at the International Criminal Court: Reflections on Article 68(3)', 13(5) *JICJ* (2015) 951-972, at 958; *see also* Art 68(3) ICCSt.

[36] M. Thieroff and E. A. Amley, Jr., 'Proceeding to Justice and Accountability in the Balkans: The International Criminal Tribunal for the Former Yugoslavia and Rule 61', 23 *Yale Journal of International Law* (1998) 231-74, at 247; *citing* Prosecutor Richard Goldstone's Opening Statement in Rule 61 Hearing Transcript, *Nikolić* (IT-94-2-R61) Trial Chamber, 9 October 1995, at 60-1.

[37] M. A. Anyah, 'Balancing the Rights of the Accused with Rights of Victims Before the International Criminal Court', in T. Mariniello (ed.), *The International Criminal Court in Search of its Purpose and Identity* (Abingdon (UK): Routledge, 2015), at 80.

[38] *Provisional Verbatim Record of the Three Thousand Two Hundred and Seventeenth Security Council Meeting*, UN Doc S/PV.3217*,* 25 May 1993, at 12.

the participants; and the reasons for the occurrence of the events.[39] The truth established by a court or tribunal is believed to serve multiple purposes, including: identifying an objective record of events; undermining denials about the existence of human rights violations; supplying therapeutic benefits to the accused; and the traditional legal function of creating a factual basis upon which the fact-finder can determine the guilt or innocence of the accused.[40] This makes the search for truth an overarching goal enabling the fulfilment of other victim-oriented purposes for trial. The importance to victims of establishing the truth cannot be overstated. As the representative for the Office of Public Counsel for Victims at the International Criminal Court stated during closing statements in the *Lubanga* trial, 'the essential concern of the victims participating in this trial, over and beyond the conviction of the accused, is therefore to contribute to the establishment of the truth, seeking for the truth and establishing the truth.'[41]

The truth-telling process undertaken during trial must fully comply with the rights of the accused.[42] A court's ability to properly determine the guilt or innocence of the accused is threatened when the two are allowed to diverge, which in turn could lead to punishment being imposed on an improper basis.[43] When the accused is convicted by way of a compromised procedure it can impact the legitimacy of

---

[39] *Promotion and Protection of Human Rights: Study on the Right to Truth: Report of the Office of the United Nations High Commissioner for Human Rights*, UN Doc. E/CN.4/2006/91, 8 February 2006, § 59; *see also* Decision on the Set of Procedural Rights Attached to the Procedural Status as Victim at the Pre-Trial Stage of the Case, *Katanga et al*. (ICC-01/04-01/07) Pre-Trial Chamber I, 13 May 2008, §§ 31-2.
[40] G. Werle and F. Jessberger, *Principles of International Criminal Law* (3rd edn., Oxford: Oxford University Press, 2014), at 38; D. Mendeloff, 'Trauma and Vengeance: Assessing the Psychological and Emotional Effects of Post-Conflict Justice', 31 *Human Rights Quarterly* (2009) 592-623, at 593.
[41] Trial Transcript, *Lubanga* (ICC-01/04-01/06) Trial Chamber I, 25 August 2011, at 62, lines 2-5.
[42] S. Zappalà, 'The Rights of Victims v. The Rights of the Accused', 8(1) *JICJ* (2010) 137-164, at 145.
[43] *Ibid*.

international criminal law as a whole. The victims also do not benefit from a less than stringent approach to truth-telling. Victims only experience justice through truth-telling if the person or people who committed the crimes against them are convicted during trial. When the truth-telling process is compromised and fails to identify the correct culprits, the victims will continue to be deprived of justice.

Establishing the 'full and complete truth' is largely impossible when the accused is not present during the trial. Certain information is often only known to the accused and it cannot be introduced into evidence if he or she is absent. That information is left undisclosed when the accused is tried *in absentia* and the goal of establishing the full and complete truth remains unmet. Additionally, international and internationalised criminal courts and tribunals rarely establish, or attempt to establish, the full and complete truth about a situation, irrespective of the accused's presence during trial. Truth developed in the context of a trial is limited to those facts that are relevant to the charges brought against the accused, and do not encompass other facts that might be relevant to the victims.[44] Little or no evidence will be introduced at trial relating to issues that do not directly relate to the crimes for which the accused has been charged, or to aspects of the prosecution's case that are uncontested.[45] International criminal law has also seen a concerted effort to prevent the introduction of evidence about crimes not being adjudicated. The Nuremberg Tribunal did not acknowledge Allied crimes committed during the Second World War.[46] The Tokyo Tribunal also refused to consider alleged Allied crimes committed

[44] E. Haslam, 'Victim Participation at the International Criminal Court: A Triumph of Hope over Experience', in D. McGoldrick, P. Rowe and E. Donnelly (eds.), *The Permanent International Criminal Court*, (Oxford: Hart Publishing, 2004), at 325.
[45] *Ibid*.
[46] V. Peskin, 'Beyond Victor's Justice? The Challenge of Prosecuting the Winners at the International Criminal Tribunals for the Former Yugoslavia and Rwanda', 4(2) *Journal of Human Rights* (2005) 213-31, at 214.

against the Japanese, and it did not to prosecute Emperor Hirohito for his actions during the war.[47] This problem has continued in the modern international and internationalised criminal courts and tribunals. The International Criminal Tribunal for Rwanda, responding to pressure from the Rwandan government, made no real effort to properly investigate and prosecute crimes committed by members of the Tutsi ethnic group.[48] Trials in Iraq did not involve charges against foreign actors, including the United Nations, the United States and other Arab countries, for their perceived support of, or lack of intervention in, the human rights violations that were committed against the victims.[49] Many Serbians believe that NATO should have been held accountable for their actions during the war in the former Yugoslavia.[50] Similarly, interviewees in Bosnia and Herzegovina are disappointed that no effort was made to determine the responsibility of the government of the Netherlands for its involvement in the Srebrenica genocide.[51] The failure to investigate or prosecute all of the crimes allegedly committed during these different situations signifies a tacit acceptance that no attempt would be made to establish the full and complete truth.

There are also factual matters about which criminal courts are not equipped to inquire. Incidents take place during conflicts that are unlikely to be the subject of court proceedings, but the details of which are part of the full and complete truth about the larger situation. Instances of this can include the failure to provide warnings

[47] N. Boister and R. Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (Oxford: Oxford University Press, 2008), at 311.
[48] Peskin, *supra* note 46, at 224-5; M. A. Fairlie, 'Due Process Erosion: The Diminution of Live Testimony at the ICTY', 34(1) *California Western International Law Journal* (2003) 47-83, at 57-8.
[49] Human Rights Center, *Iraqi Voices: Attitudes Toward Transitional Justice and Social Reconstruction* (Berkeley: UC Berkeley School of Law, 2004), at 29-31.
[50] V. Peskin, *International Justice in Rwanda and the Balkans* (Cambridge: Cambridge University Press, 2008) 33-4; R. Steinke, *The Politics of International Criminal Justice: German Perspectives from Nuremberg to the Hague* (Oxford: Hart Publishing, 2012), at 16.
[51] J. N. Clark, 'The Limits of Retributive Justice', 7(3) JICJ (2009) 463-487, at 472.

of impending attacks, perceived refusals to prevent harm, and not supplying information about where the bodies of missing people are buried.[52] These sorts of actions, or inactions, are not crimes as defined by the International Criminal Court's Statute, and therefore it is not an appropriate forum for establishing the truth about these matters. Moreover, these are situations that demand an open communal dialogue about the issues that are dividing the community, not a determination of guilt or innocence, making a court the wrong environment in which to confront these issues.[53] However, they are also issues that are part of the full and complete truth.

Overall, the international community has been willing to accept international criminal trials that establish a less than complete version of the truth. Some commentators have also argued that victims of atrocity crimes do not require a full accounting of the truth. It has been suggested that victims are not really interested in what happened in a given situation, but are instead concerned with why it happened and who is responsible.[54] This argument implies the need for a less robust investigation into the entire truth about the situation under consideration, as the only facts needed are those necessary to apportion responsibility. The difficulty with this position is that it does not properly account for the sort of information victims of atrocity crimes have specifically identified as being essential to aiding in their own psychological healing. Individuals affected by atrocity crimes have specifically linked their ability to heal to the development of a more complete version of the truth about the situation that resulted in their victimisation. In 2011, ninety-three per cent of

[52] *Ibid* at 473.
[53] D. Ajdukovic and D. Corkalo, 'Trust and Betrayal in War', in E. Stover and H. M. Weinstein (eds.), *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (Cambridge: Cambridge University Press, 2004), at 300.
[54] P. Akhavan, 'Justice in The Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal', 20 *Human Rights Quarterly* (1998) 737-815, at 770; *quoting* M. Ignatieff, 'Articles of Faith', 25(5) *Index on Censorship* (1996) 110-122, at 111.

Cambodians interviewed believed that '[i]t is necessary to find the truth about what happened during the Khmer Rouge regime.'[55] Ninety-four per cent of Rwandans identified revealing 'the truth about what happened in 1994' as one purpose for trial, and over eighty per cent of respondents connected learning the truth about atrocity crimes to reconciliation and healing.[56] Eighty-nine per cent of interviewees in the Central African Republic and Northern Uganda indicated that it was important to find out the truth about the atrocity crimes committed in their respective countries.[57] Survey respondents in the Central African Republic agreed that finding out the truth was important 'to understand why the conflict and violence happened', 'because the truth must be known' and 'to know who is responsible.'[58] People from Northern Uganda also valued knowing the truth and specified 'so the people will not forget', 'so that history will be known', and 'identifying those responsible' as reasons for learning the truth.[59] Victims in Iraq preferred expressive reasons for establishing the truth, including 'show[ing] the world the truth of what happened in Iraq' and 'ensuring that future generations know what happened and what mistakes were

[55] P. Pham, P. Vinck, M. Balthazard and S. Hean, *After the First Trial: A Population Based Survey on Knowledge and Perception of Justice and the Extraordinary Chambers in the Courts of Cambodia* (Berkeley: Human Rights Center, UC Berkeley School of Law, 2011), at 31.
[56] T. Longman, P. Pham and H. M. Weinstein, 'Connecting Justice to Human Experience: Attitudes Toward Accountability and Reconciliation in Rwanda', in E. Stover and H. M. Weinstein (eds.), *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (Cambridge: Cambridge University Press, 2004), at 212-13.
[57] P. Vinck and P. Pham, *Building Peace Seeking Justice: A Population-Based Survey on Attitudes About Accountability and Social Reconstruction in the Central African Republic*, (Berkeley: Human Rights Center, UC Berkeley School of Law, 2010), at 37; P. Pham and P. Vinck, *Transitioning to Peace: A Population-Based Survey on Attitudes About Social Reconstruction and Justice in Northern Uganda* (Berkeley: Human Rights Center, UC Berkeley School of Law, 2010), at 46.
[58] Vinck and Pham, *supra* note 57, at 37.
[59] Pham and Vinck, *supra* note 57, at 46.

made.'[60]

These surveys are not conclusive, but they do demonstrate the importance victims of atrocity crimes place on establishing the truth. They also show that learning the truth about a situation can serve a wide variety of purposes for victims, many of whom demand a full and complete account of the truth. However, it is dubious whether such an inquiry is possible without the participation of the accused. An example of this can be found in the difficulty the *ad hoc* Tribunals had in locating the burial places of a number of victims murdered in Rwanda and the former Yugoslavia. Living victims of both conflicts have identified the importance of learning where their murdered loved ones are buried so that they might gain a sense of closure by knowing their loved ones are dead and that they received a proper burial.[61] Unfortunately, it was impossible for the *ad hoc* Tribunals to conduct sufficient forensic investigations to establish the burial places of many of the war dead due to the sheer number of people killed, coupled with the secretive ways in which their bodies were disposed.[62] That left the alleged perpetrators as the only people with the knowledge necessary to establish information considered vital by the victims to restoring their sense of justice and psychological wellbeing.

When an accused who may be the only source of information about a particular issue is tried *in absentia,* it means that the truth cannot be established about those issues within his or her exclusive knowledge. This means that the victims are deprived of a remedy, and in turn the sense of justice, that a trial is designed to afford

[60] Human Rights Center, *Iraqi Voices*, *supra* note 49, at 38.
[61] M. Doretti and L. Fondebrider, 'Science and Human Rights', in V. Buchli and G. Lucas (eds.), *Archaeologies of the Contemporary Past* (Abingdon (UK): Routledge, 2001), at 143.
[62] E. Stover and R. Shigekane, 'Exhumation of Mass Graves: Balancing Legal and Humanitarian Needs', in E. Stover and H. M. Weinstein (eds.), *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (Cambridge: Cambridge University Press, 2004), at 86.

to them. The presence of the accused is also useful to the extent that some evidence suggests that the truth-telling process is only effective for victims when it is accompanied by an apology from the perpetrators of the crimes against them.[63] As a result, trials conducted outside of the presence of the accused often do not meet the needs of the victims, because such trials are incapable of establishing the full and complete truth necessary to meet their needs. Additionally, an absent accused is much less likely to apologise for his or her alleged crimes, thus depriving the victims of an important component of the truth-telling process. Therefore, the truth telling process, as currently constituted, falls short of what the victims demand to enable them to experience a sense of justice.

An accused tried *in absentia* is also deprived of the opportunity to have the full and complete truth established in the case against him or her. There are multitudes of ways in which a present accused can positively impact the court's ability to establish the truth. He or she can instruct and consult with his or her defence counsel; suggest questions to be posed to witnesses during cross-examination; and testify before the relevant Court or Tribunal about matters that might otherwise go unaddressed.[64] When the defendant is not present the prosecution has free rein to characterise the evidence in any way it chooses, to question witnesses about incriminating facts while ignoring exculpatory evidence, and to generally create a case that upon first glance appears unimpeachable. It is only through cross-examination and the introduction of contrary evidence that the trier of fact is able to

[63] D. Mendeloff, 'Truth-Seeking, Truth-Telling, and Post-Conflict Peace Building: Curb the Enthusiasm', 6 *International Studies Review* (2004) 355-80, at 376.
[64] A. Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2003) 403; F. A. Gilligan and E. J. Imwinkelried, 'Waiver Raised to the Second Power: Waivers of Evidentiary Privileges by Lawyers Representing Accused being Tried in Absentia', 56 *South Carolina Law Review* (2005) 509-532, at 524; Pons, *supra* note 24, at 1310, fn 16.

develop a full and complete understanding of the truth leading to an adequate assessment of the guilt or innocence of the accused.

Trial *in absentia* does not meet the truth-telling needs of either the accused or the victims of atrocity crimes. Proceeding in the accused's absence denies him or her the opportunity to adequately test the evidence presented against them and to present exculpatory evidence. It prevents the victims from learning about facts that they may consider relevant and important to fostering a sense that justice has been served. Trials *in absentia* do nothing more than promote a feeling that justice has been served without adequately demonstrating that it has actually been achieved. While it may not be possible for a trial to ever establish the full and complete truth about a situation, it is a much more attainable goal when trial takes place in the presence of the accused.

B. Accountability

The meaning of accountability has changed over time but it is thought that legal accountability, that is, the aims arising out of prosecution and conviction, must remain the most prominent form of accountability.[65] It is also the type of accountability most commonly derived from international criminal trials. Legal accountability, in the context of international criminal law, involves holding individuals responsible for violations of any crimes proscribed by the applicable statute.[66] Legal accountability is seen as the natural counterpoint to impunity, and the absence of legal accountability is thought to be immoral, damaging to victims' interests, in violation of international legal norms, and will lead to the recurrence of

[65] C. Fournet, 'Mass Atrocity: Theories and Concepts of Accountability - On The Schizophrenia of Accountability', in R. Henham and M. Findlay (eds), *Exploring the Boundaries of International Criminal Justice* (London: Routledge, 2011), at 28.
[66] S. Ratner, J.S. Abrams and J.L. Bischoff, A*ccountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, (3rd edn., Oxford: Oxford University Press, 2009), at 3, 10.

atrocity crimes.[67]

Whether an accused can be held accountable in his or her absence is dependent on whether punishment is a necessary part of demonstrating accountability. An absent accused often cannot be punished even if her or she is convicted, because he or she is not under the control of the trial court. There is a divergence of opinion about whether accountability can exist in the absence of punishment. Many commentators believe that punishment is an essential component of delivering justice to the victims.[68] In particular, Jeremy Rabkin explains that punishment is necessary to achieve accountability because it acts as recognition that the victims have suffered a wrong and that society is committed to righting that wrong.[69] Trial Chamber I of the International Criminal Tribunal for the former Yugoslavia echoed this viewpoint when it explained that one purpose of punishment is to 'reflect…the calls for justice from the persons who have been victims or suffered because of the crimes'.[70]

Victims have also emphasized the important role punishment plays in the realization of their own sense that justice has been done. When interviewed, many victims of atrocity crimes have indicated that the perpetrators of the crimes committed

[67] M. C. Bassiouni, 'Searching for Peace and Achieving Justice: The Need for Accountability', 59 *Law and Contemporary Problems* (1996) 9-28, at 19; Fournet, *supra* note 65, at 28; N. J. Kritz, 'Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights', 59(4) *Law & Contemporary Problems* (1996) 127-52, at 129.
[68] Bassiouni, *supra* note 67, at 26-27; Ratner et al., *supra* note 67, at 175; J. Rabkin, 'Global Criminal Justice: An Idea Whose Time has Passed' 38 *Cornell International Law Journal* (2005) 753-777, at 775; L.E. Fletcher and H.M. Weinstein, 'Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation', 24 *Human Rights Quarterly* (2002) 573-639, at 589; M.A. Drumbl, 'The Expressive Value of Prosecuting and Punishing Terrorists: *Hamdan*, the Geneva Conventions, and International Criminal Law' 35 *George Washington Law Review* (2007) 1165-1199, at 1182-83.
[69] Rabkin, *supra* note 68, at 775.
[70] Sentencing Judgment, *Obrenović* (IT-02-60/2-S) Trial Chamber I, 10 December 2003, § 45.

against them should be tried and punished for their actions.[71] A 2015 study conducted in Kenya, Uganda, Côte d'Ivoire and the Democratic Republic of Congo found that victim participants want the accused to be convicted and punished for their alleged crimes.[72] Individuals affected by atrocity crimes in the Central African Republic overwhelmingly felt that the perpetrators of atrocity crimes should be held accountable, and advocated in favour of a variety of punishments ranging from the very general 'punishment', to imprisonment, summary execution, and the rather oblique statement that the perpetrators of atrocity crimes 'should confront justice.'[73] A survey conducted in 2002 of a randomly selected group of Rwandans determined that 96.8% of respondents believed it was important to try those responsible for committing crimes during the genocide, and 92.3% felt that the purpose of trials was 'to punish those who have done wrong', although for some punishment was a secondary consideration to reparations in the form of compensation and forgiveness.[74] In a 2004 study conducted in Iraq, the majority of those interviewed advocated in favour of summary justice in the form of execution or torture without trial.[75] This suggests that in Iraq, punishment was even more important than a finding of guilt. Taken together, these surveys present a compelling argument that the victims of atrocity crimes are particularly interested in seeing the perpetrators of those crimes punished for their actions. This demonstrated interest in the punishment of the

[71] E. Kiza and H.-C. Rohne, 'Victims' Expectations Towards Justice in Post-Conflict Societies: A Bottom-Up Perspective', in R. Henham and M. Findlay (eds), *Exploring the Boundaries of International Criminal Justice* (London: Routledge, 2011), at 96.
[72] Human Rights Center, *The Victims' Court?: A Study of 622 Victim Participants at the International Criminal Court* (Berkeley: Human Rights Center, UC Berkeley School of Law, 2015), at 3.
[73] Vinck and Pham, *supra* note 57, at 29.
[74] Longman et al., *supra* note 56, at 212-13, 219; T. Longman and T. Rutagengwa, 'Memory, Identity, and Community in Rwanda', in E. Stover and H. M. Weinstein (eds.), *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (Cambridge: Cambridge University Press, 2004), at 173.
[75] Human Rights Center, *Iraqi Voices*, *supra* note 49, at 26.

perpetrators also suggests that punishment is a necessary aspect of any form of accountability sufficient to act as a remedy for the victims of atrocity crimes.

Richard Goldstone points out that 'full justice' for victims of atrocity crimes means seeing the accused sentenced to an adequate punishment following his or her conviction. That will likely not occur when the accused is tried in his or her absence as he or she is not available to be punished, thus resulting in a failure to deliver full accountability. The victims must then determine whether partial accountability is sufficient to contribute to the overall remedy necessary for justice to be done. As William Schabas asserts, a greater sense of justice might be derived from condemning the perpetrators of atrocity crimes than what is accomplished through imposing punishment. [76] Martti Koskenniemi reiterated the sentiment that often victims do not expect punishment 'but rather a recognition of the fact that what they were made to suffer was "wrong", and that their moral grandeur is symbolically affirmed.'[77] The entry of a guilty verdict or the provision of reparations could provide the recognition desired by victims even in the absence of punishment. Under these circumstances, the victims can dispute whether they have received the justice they want, but may have to accept that some accountability is better than none at all.

C. Reparations

Reparations represent one area in which the victims' interests in justice might be satisfied without the participation of the accused. Individuals affected by atrocity crimes have consistently claimed that the victims of those crimes should be entitled to reparations in recognition of the harm they have suffered. Victim participants from

[76] W.A. Schabas, 'Sentencing by International Tribunals: A Human Rights Approach' (1997) 7(2) *Duke Journal of Comparative and International Law* (1997) 461-517, at 500, 516.
[77] M. Koskenniemi, 'Between Impunity and Show Trials', 6 *Max Planck U.N. Yearbook* (2002) 1-35, 11.

Uganda and Kenya involved in cases being adjudicated at the International Criminal Court identified the prospect of receiving reparations as their primary motivation for becoming involved in the prosecutions.[78] Their counterparts in the Democratic Republic of Congo and Côte d'Ivoire did not identify reparations as their main purpose for cooperating with the court, but they did place reparations amongst their reasons for participating, while also making it clear that they generally expected reparations following trial.[79] Victim participants were not the only ones to express an interest in reparations. An overwhelming 97% of interviewees in the Central African Republic, not all of whom identified themselves as victims, believed that reparations for the victims of crimes committed there are an important aspect of delivering justice.[80] Additionally, most Iraqis responding to a 2004 survey felt that it was necessary to provide reparations in the form of rehabilitation and compensation to allow the country to move on from the crimes committed during Saddam Hussein's regime.[81]

In 2005, the United Nations General Assembly recognized a right to reparations for victims of gross violations of international human rights law or international humanitarian law.[82] Reparations are meant to be proportional to the harm done and fall into five categories: Restitution, Compensation, Rehabilitation, Satisfaction and Guarantees of Non-Repetition.[83] National governments are responsible for reparations for crimes that can be attributed to the state, and individuals are responsible for paying reparations when found liable by a competent

[78] Human Rights Center, *The Victims Court*, *supra* note 72, at 36, 58.
[79] *Ibid* at 46, 68.
[80] Vinck and Pham, *supra* note 57, at 35.
[81] Human Rights Center, *Iraqi Voices*, *supra* note 49, at 40.
[82] GA Res 60/147, 16 December 2005, at § 1 and Principle 11 of the Annex.
[83] *Ibid* at Principles 15, 19-23.

court.[84] Prior to the General Assembly's decision to acknowledge victims' right to reparations, victims were dependent on the individual rules applied at the international or internationalised criminal court or tribunal at which the matter pertaining to their victimisation was being adjudicated. In general these rules allowed for very limited forms of reparations, and monetary damages were often excluded entirely.[85]

Article 75 of the International Criminal Court's Statute goes further than many other international criminal justice institutions and permits victims to seek reparations in the form of restitution, compensation and rehabilitation.[86] However, the International Criminal Court has limited the category of victims who are eligible for financial reparations. For the purposes of determining reparations a condition attaches to the third criterion to be applied when deciding if an individual qualifies as a victim. To be considered a victim, an individual must have been harmed during the commission of a crime falling under the jurisdiction of the International Criminal Court.[87] For a victim to be eligible for reparations, the accused must have been convicted of the crime that caused the harm to the victim.[88] As a result, the interests of victims of atrocity crimes may be split at the reparations stage of proceedings between those that suffered harm as a result of a crime for which the accused was convicted and those that were not.

Victims' eligibility for reparations is unaffected when a trial is conducted *in absentia*. Although orders to pay reparations can make up part of the sanctions imposed on an individual following his or her conviction, the victims can receive

---

[84] *Ibid* at Principle 15.
[85] Art 24(3) ICTYSt.; Art 23(3) ICTRSt.; Art 19(3)SCSLSt.; Art 38 ECCC Law.; Art 25 STLSt.
[86] Art 75 ICCSt.
[87] *Katanga Reparations Decision*, *supra* note 2, at § 36.
[88] *Ibid* at § 37.

reparations that are not paid by the convicted perpetrator. The United Nations General Assembly mandates that individual States should establish national programmes to pay reparations to victims, or to supply them with other forms of assistance should those guilty of causing the victims harm prove unwilling or unable to do so.[89] The International Criminal Court also has a mechanism permitting the Trial Chambers to order that the Court's Trust Fund pay the reparations awarded to the victims.[90] These rules mean that the payment of reparations is unrelated to the presence of the accused because there are other entities that will be responsible for paying the necessary reparations to the victims.

The accused's presence at trial is largely irrelevant to victims primarily motivated by receiving financial reparations. In fact, it could be argued that it is in the best interests of those victims driven by receiving reparations to proceed *in absentia* if the alternative would be the postponement of trial and an accompanying delay in the award of reparations. Further, the absence of the accused may benefit victims entitled to reparations to the extent that conviction could be more likely when the accused is not available to hear and challenge all of the evidence against them. In contrast, those victims that are not eligible for reparations are more likely to experience a sense of justice through the establishment of the full and complete truth and seeing the accused be held accountable for his or her actions. Of course, an individual victim's entitlement to reparations is only determined after the trial has ended when the judgment is rendered. Therefore, whether reparations will constitute part of the victim's sense of justice can also only be discovered after the trial. Depending on the verdict, this creates a situation in which a relatively small number of victims might be eligible for reparations. Such uncertainty makes it difficult to justify proceeding

[89] Annex to UNGA Res 60/147, *supra* note 82, at Principle 16.
[90] Art 75(2) ICCSt.

against an accused in his or her absence when it remains speculative as to what impact the award of reparations may have on the victims' ability to experience a sense that justice has been served.

5. Conclusion

Providing victims with a sense of justice is one of the dominant goals of international criminal law. However, despite its importance, international and internationalised criminal courts and tribunals have been somewhat opaque about what needs to occur for the victims to experience justice. In response, commentators have suggested that for justice to be achieved victims must be provided with a remedy that incorporates the development of the full and complete truth relating to their victimisation, holding the individual perpetrators of the crimes that led to their victimisation accountable for their actions, and providing the victims with reparations in an effort to recognise the harms they have suffered and provide them with some redress.

Supplying the victims with a remedy made up of these three components is not possible when the accused is tried *in absentia*. The truth-telling component is compromised without the participation of the accused because he or she often possesses information that is fundamental to establishing the full and complete truth about a situation. Additionally, an absent accused cannot apologise for his or her behaviour, a step that is necessary for some victims to feel as if justice has been served. Full accountability can also not be achieved if the accused is not present. For many victims, the condemnation of the accused does not deliver sufficient accountability if it is not accompanied by punishment. An absent accused cannot be punished, thus thwarting the sense of justice sought by the victims. In contrast, trial *in absentia* does not threaten the ability of the victims to receive reparations. The

International Criminal Court has set up mechanisms whereby the victims will still receive reparations following the conviction of the accused regardless of whether he or she was present during the trial. Therefore, the accused's presence during trial may be immaterial to a victim primarily motivated by receiving reparations.

On the whole, trials *in absentia* can deliver no more than a partial form of justice to the victims. In particular, their interests in truth and accountability are fundamentally compromised if the accused is not present. The inability of trials *in absentia* to provide the victims with a complete sense of justice suggests that proceeding in the accused's absence should be avoided, as it is not in the interests of the victims. This is even more true when the disadvantage such trials impose upon the accused is taken into account. In the absence of a clear benefit to the victims it is difficult to justify conducting trials *in absentia* in light of the detriment they inflict upon the fair trial rights of the accused.